

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the matter of)
)
 Implementation of Sections 11 and 13)
 of the Cable Television Consumer)
 Protection and Competition Act of 1992)
)
 Horizontal and Vertical Ownership)
 Limits, Cross-Ownership Limitations)
 and Anti-Trafficking Provisions)

MM Docket No. 92-264

PETITION FOR PARTIAL RECONSIDERATION

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.106 of the Commission's Rules,¹ hereby petitions the Commission to reconsider in part the *Report and Order and Further Notice of Proposed Rule Making* (the "*Report & Order*") in the captioned proceeding.² Specifically, WCA urges the Commission to revise newly-redesignated Section 21.912(e) of its rules to grandfather from the effects of newly-adopted Section 21.912(a)-(c) those wireless cable operators who took advantage of the so-called "overbuild exception" previously in Section 21.912 between February 8, 1990 and December 4, 1992.

Since first adopted, Section 21.912 of the Commission's Rules has generally barred a cable operator from holding a license for, or leasing transmission capacity of, a Multipoint

¹47 C.F.R. § 1.106 (1992).

²*Implementation of Section 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions*, FCC 93-332, MM Docket No. 92-264 (rel. July 23, 1993)[hereinafter cited as "*Report & Order*"].

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Distribution Service ("MDS") station with a protected service area that overlaps the cable operator's franchise area.³ However, Section 21.912 included when it was adopted an overbuild exception that permitted a cable system franchisee to hold a license for, or lease transmission capacity of, an MDS station regardless of any overlap where there were two or more cable franchisees serving the franchise area. Several wireless cable operators have taken advantage of it, securing overbuild cable television franchises. Generally, these operators continue to rely primarily on wireless transmissions to deliver service to consumers, but hardwire small areas where restrictions on the installation of antennas, line-of-sight limitations or other factors dictate the use of coaxial cable technology.

On October 5, 1992, Congress passed the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"). Section 11(a) of the 1992 Cable Act amended Section 613(a) of the Communications Act of 1934 to make it "unlawful for a cable operator to hold a license for multichannel multipoint distribution service . . . in any portion of the franchise area served by that cable operator's cable system."⁴ Finding that the overbuild exception "appears to conflict with the statutory cable/MMDs [*sic*] cross-ownership ban, and Congress did not specifically provide for such an exception," the *Report & Order*

³*Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 6410, 6417 (1990), *on recon.* 6 FCC Rcd 6764, 6775-76 (1991).

⁴*The Cable Television Consumer Protection and Competition Act of 1992*, 106 Stat. 1486-1487 (1992)[hereinafter cited as "1992 Cable Act"].

promulgates a revised version of Section 21.912 -- one that eliminates the overbuild exception.⁵

By this petition, WCA is seeking reconsideration of the Commission's decision not to grandfather every situation where parties have relied on the overbuild exception prior to the December 4, 1992 effective date of the 1992 Cable Act. Simply stated, that decision is both unlawful and bad public policy.

As the Commission acknowledges in the *Report & Order*, "Section 613 . . . directs the Commission to waive all cable/MMDS . . . cross-ownership interests existing as of December 4, 1992, the effective date of the 1992 Cable Act."⁶ Yet, the Commission has only grandfathered cable/MDS cross-interests existing as of February 8, 1990 in the apparent belief that no cable/MDS cross-interests could lawfully be established after that date. The Commission believed such an approach would comport with amended Section 613 because when it initially adopted the cable/MDS cross-ownership restriction, it only grandfathered cross-interests existing as of February 8, 1990.⁷

The flaw in the Commission's approach, however, is that it fails to consider those parties that relied in good faith on the overbuild exception to establish lawful cross-interests after February 8, 1990. The former version of Section 21.912 did not ban all cable/MDS cross-interests arising after February 8, 1990 -- the overbuild exception provided an avenue

⁵See *R&O*, at ¶ 107

⁶*Id.* at ¶ 93.

⁷See *id.*

for new cross-interests to arise without running afoul of the Commission's Rules. Thus, those who relied on the overbuild exception have been placed in an untenable position.

Because the *Report & Order* fails to grandfather those wireless cable operators who took advantage of the overbuild exception between February 4, 1990 and December 4, 1992, it is unlawful. It was Congress' mandate that all cable/MDS cross-ownership interests that existed on or before December 4, 1992 be grandfathered.⁸ Congress specifically provided in Section 613(a) of the Communications Act of 1934, as amended by Section 11(a) of the 1992 Cable Act, that pre-existing cross-ownership interests should be allowed. Therefore, the *Report & Order* is fundamentally at odds with Congress' desire to grandfather pre-existing cross-interests existing as of December 4, 1992.

Furthermore, the *Report & Order* is bad public policy because it does not contain provisions to protect those who relied in good faith on the overbuild exception in Section 21.912. Generally when the Commission adopts new cross-ownership restrictions, it grandfathers pre-existing situations.⁹ Moreover, the Commission has consistently found that

⁸See *1992 Cable Act*, 106 Stat. 1486-1487 (1992).

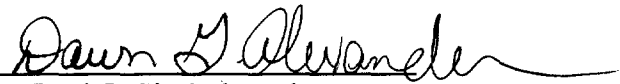
⁹*Divestiture of Cross-Owned Cable Systems, Third Report and Order*, 97 F.C.C.2d 65 (1984), FCC Rule § 76.501(b)(2); *Cable Communications Policy Act of 1984*, 47 U.S.C. § 613(f) [grandfathering cross-ownership of cable systems and broadcast stations except for egregious combinations]; *Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order*, 50 F.C.C.2d 1046, 1047, *Amended on Recon.*, 53 F.C.C.2d 589 (1975); *aff'd in part, remanded in part*, 555 F.2d 938; *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) [upholding FCC regulations prospectively barring newspaper-broadcast combinations where there is common ownership of a radio or television broadcast station and a daily newspaper in the same community, and grandfathering all existing combinations but for selected "egregious cases"]; *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 22 F.C.C.2d 306, 322-23 (1970), *recon. granted in part*, 28 F.C.C.2d 662, 665-66 (1971) [prohibiting common

grandfathering is appropriate to avoid disruption in service.¹⁰ Therefore, the *Report & Order's* failure to grandfather all cable/MDS cross-ownership interests that existed prior to December 4, 1992 is inconsistent with the Commission's policies and practices.

WHEREFORE, for the foregoing reasons, WCA urges the Commission to reconsider the *Report & Order* and amend Section 21.912(e) to grandfather all cable/MDS cross-ownership interests that existed on or before December 4, 1992, the effective date of the 1992 Cable Act.

Respectfully submitted,

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ownership of a VHF TV station and a radio station serving the same market and grandfathering existing combinations].

¹⁰See, *Cable Television Report and Order*, 36 F.C.C.2d 143, 185 (1972) [grandfathering pre-existing signal carriage arrangements].